STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Christopher M. Murray, Presiding Justice

BRUCE B. FEYZ, M.D., an individual,

Plaintiff-Appellee,

v

MERCY MEMORIAL HOSPITAL, MEDICAL STAFF OF MERCY MEMORIAL HOSPITAL, RICHARD HILTZ, JAMES MILLER, D.O., JOHN KALENKIEWICZ, M.D., J. MARSHALL NEWBERN, D.O., and ANTHONY SONGCO, M.D.,

Defendants-Appellants.

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Supreme Court No. 128059

Court of Appeals No. 246259

Monroe County Circuit Court
No. 01-14174-CZ

BRIEF OF MICHIGAN HEALTH & HOSPITAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

PROOF OF SERVICE

EXHIBITS (BOUND SEPARATELY)

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STATEMENT OF INTEREST

The Michigan Health & Hospital Association ("MHA") is a membership organization representing 145 Michigan acute-care hospitals. In addition to representing all but two of Michigan's acute-care hospitals, MHA's members also include psychiatric, rehabilitative, and other specialty hospitals. Its members include nonprofit, public and private hospitals, both rural and urban. MHA has served its members, and thereby, the patients they treat, in a leadership role since 1919 by developing and promoting programs and positions that have enhanced Michigan hospitals' ability to deliver comprehensive, high-quality, and cost-efficient care.

Each of MHA's hospital members is obligated to ensure that only well-qualified and competent physicians maintain clinical privileges to practice medicine and provide care in its facility. The high quality of medical care is initially made possible through the credentialing process and thereafter through the peer review process. These two processes, however, are only effective if the participants are allowed to investigate, discuss, and issue recommendations openly and honestly and without fear of the threat of liability and litigation.

Michigan has long recognized the need to ensure that the participants in such critical hospital processes are protected from claims arising from their activities. Thus, numerous statutes protect the confidentiality of peer review activities. In addition, Michigan case law has consistently held that its courts will not interfere with the staffing decisions at private hospitals in Michigan through common-law contract or tort claims. These hospitals have the power to appoint and remove physician staff members without judicial oversight or supervision. The Court of Appeals' decision, however, disregards such long-established Michigan case law and the doctrine of stare decisis. No matter how the Court of Appeals attempts to distinguish the Plaintiff-Appellee's claims from prior and controlling law, the contract and tort claims are

indistinguishable and thus the peer review, staffing and credentialing activities and decisions regarding Plaintiff-Appellee should not be subject to judicial review.

The Court of Appeals has also committed a clear error of major significance to the jurisprudence of Michigan in redefining malice under the peer review immunity statute creating a "per se" rule that all civil rights claims entail malice so as to eliminate peer review immunity. This judicial creation will have a chilling impact on the medical peer review process under which the participants have long been protected from liability. If allowed to stand, the Court of Appeals' decision will expose all participants in the peer review process at all of Michigan's hospitals to any and all potential civil rights claims, irrespective of the subjective good faith and lack of actual malice of such participants.

The peer review process is a critical element necessary to ensure quality health care is provided by competent physicians. The risk that the process will be undermined by the Court of Appeals' decision is too great.

Based on the Court of Appeals' holding, any Michigan hospital will be hard-pressed to find physicians willing to actively and honestly participate in the peer review and credentialing process if such activity will subject them to potential liability and litigation. Likewise, a hospital may be reluctant to make certain staffing decisions that are necessary to ensure patient safety and quality medical care to avoid potential claims and judicial oversight. The credentialing and peer review process is critical to ensure that only well-qualified physicians practice in Michigan hospitals and that the patients of Michigan hospitals receive the best medical care available. The Court of Appeals has significantly reduced the effectiveness of such processes.

The decision of the Court of Appeals is clearly erroneous and in contravention of existing statutes, longstanding precedential case law, and MCR 7.215(J), and as such, Amicus Curiae, in

support of Defendants-Appellants, respectfully asks this Court to reverse all counts that were affirmed by the Court of Appeals, and order it to reinstate the trial court's order dismissing all counts.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amicus Curiae adopts by reference the Concise Statement of Material Proceedings and Facts of Defendants-Appellants.

SUMMARY OF ARGUMENT

The Court of Appeals' ruling in Feyz v Mercy Memorial Hospital, 264 Mich App 699; 692 NW2d 416 (2005), encroaches on legislative authority in favor of judicial legislation. It simply leaves no cogent, legal theory on which the long-standing notions of peer review immunity and confidentiality have stood. The instant Court of Appeals' decision goes further by adopting its own definition of malice, ignoring the definition it adopted previously in interpreting the peer review immunity statute and inexplicably analyzes away clear, binding precedent on the doctrine of judicial nonreview previously set forth by the Court of Appeals in Long v Chelsea Community Hospital, 219 Mich App 578; 557 NW2d 157 (1996).

The Court of Appeals has ignored the principles of stare decisis, legislative acquiescence, and the mandate of MCR 7.215(J), which requires it to follow the binding precedent in Long—all to reach a desired legal result for the Plaintiff-Appellee. The purpose of the law is to provide a consistent framework in which a citizen can model their behavior, and this cannot be done when a court is allowed to twist the law to justify what it believes is the right thing to do. The Court of Appeals' decision in Feyz eliminates all consistency that Michigan jurisprudence has on the subject of peer review immunity—it violates all logic and the Michigan Court Rules upon which the Court of Appeals is mandated to abide under the law.

If the Court of Appeals' decision is allowed to stand without review by this Court, we will be left with peer review statutes that no longer have meaning or applicability. The Court of Appeals has previously ruled on the judicial reviewability of private hospital staffing decisions under Long, and such ruling remains valid, precedential, and binding. Moreover, the compelling policy reasons for judicial nonreview of peer review and medical staffing decisions are wholly ignored by the Court of Appeals. As Amicus Curiae will demonstrate, the important public policy reasons for honoring the doctrine of judicial nonreviewability of a private hospital's staffing and peer review decisions are imminently present in the instant matter.

In recognizing the importance of peer review activities, Michigan law provides immunity for actions taken in furtherance of peer review, except those done with malice. In order to reach its desired conclusion, the Court of Appeals took it upon itself to create a "per se" rule that all civil rights claims entail "malice" so that peer review immunity is automatically eliminated. In doing so, the Court of Appeals ignored previous decisions that define malice and further ignored the intent of the Michigan Legislature in providing for such immunity.

The Court of Appeals further incorrectly held that Plaintiff-Appellee's tort and civil rights claims against the Medical Staff Executive Committee and the other Defendants-Appellants premised on their disclosure to Health Professional Recovery Program were reviewable in direct contravention with Defendants-Appellants' immunity from liability under MCL 333.16244(1).

Finally, the Court of Appeals, in reaching its desired result illogically refused to apply peer review immunity to the common-law claims against the Medical Staff Executive Committee of Mercy Memorial Hospital (hereinafter referred to as "Mercy") based on the statement that Defendants-Appellants had not "argued" that the Medical Staff Executive Committee constituted a peer review committee. As Amicus Curiae will demonstrate not only did Defendants-

Appellants indeed argue such claim, but that the Medical Staff Executive Committee clearly constitutes a peer review committee and should be accorded all proper peer review committee immunity under Michigan statutes and case law.

As Amicus Curiae will show infra, the Court of Appeals was in clear error in its holding. Amicus Curiae, along with Defendants-Appellants, respectfully asks this Court to reverse the Court of Appeals and reinstate the predictable framework upon which peer review issues have previously been analyzed in Michigan and upon which Michigan hospitals have long relied.

ARGUMENT

I. The Michigan Court of Appeals erred in defying MCR 7.215(J)(1), compelling policy reasons underlying the doctrine of judicial nonreview, and the doctrine of stare decisis when it ignored longstanding precedent holding that contract and related tort claims of hospital staffing decisions are not subject to judicial review.

Staff privileges are the formal permission granted by a hospital to a physician where a hospital undergoes a credentialing process to ensure that the physician is licensed and qualified to competently treat specific conditions or to perform specific procedures based on the physician's experience, training, and certain performance criteria. See generally Muzquiz v WA Foote Mem'l Hosp, Inc, 70 F3d 422 (CA 6, 1995). Thus, physicians' privileges are not physicians' rights. Michigan hospitals are statutorily "responsible for selection of the medical staff, and quality of care rendered in the hospital," and each hospital must ensure that physicians are "granted hospital privileges consistent with their individual training, experience, and other qualifications." MCL 333.21513. The Medical Staff Bylaws (the "Bylaws") at Mercy, as well as all hospitals in Michigan, address the peer review process by describing in detail how medical staff credentialing, disciplinary, and corrective action processes will be conducted. These Bylaws are implemented to meet the requirements of Section 21513. A hospital has the sole

responsibility and discretion for its peer review activities, and our courts, prior to Feyz, did not intervene in such issues except in very rare circumstances. The doctrine of judicial nonreview is a common-law principle in Michigan that co-exists with a number of statutes that mandate confidentiality of the peer review process and grant immunity for participating in peer review activities.

The majority opinion of the Court of Appeals in this present Appeal has all but decimated the doctrine of judicial nonreview of a private hospital's staffing decisions first recognized in Michigan in Hoffman v Garden City Hospital, 115 Mich App 773; 321 NW2d 810 (1982), and followed in numerous other appellate cases, particularly Long v Chelsea Community Hospital, 219 Mich App 578 (1996); 557 NW2d 157 (1996). In doing so, the Court of Appeals has clearly erred by completely ignoring the policy considerations underlying the doctrine of judicial nonreview as stated in these appellate cases.

In addition, the majority opinion of the Court of Appeals completely ignored the principles of stare decisis in handing down its decision in the present case in contravention of case after case, both published and unpublished, state and federal, all consistently holding that contract and related tort claims arising out of the staffing decisions of private hospitals are not reviewable by Michigan courts.[1] Further, MCR 7.215(J) requires the Court of Appeals to follow the precedent set forth in Long because it is directly on point with regard to the judicial nonreview of contract claims, and the case was handed down by the same court after November 1, 1990.

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[1] Long v Chelsea Comty Hosp, 219 Mich App 578; 557 NW2d 157 (1996), Sarin v Samaritan Health Ctr, 176 Mich App 790; 440 NW2d 80 (1989), Bhogoanker v Metro Hosp, 164 Mich App 563; 417 NW2d 501 (1987), Dutka v Sinai Hosp of Detroit, 143 Mich App 170; 371 NW2d 901 (1985), Veldhuis v Cent Michigan Comty Hosp, 142 Mich App 243; 369 NW2d 478 (1985), Regaulos v Comty Hosp, 140 Mich App 455; 364 NW2d 723 (1985), Hoffman v Garden City Hosp-Osteopathic, 115 Mich App 773; 321 NW2d 810 (1982), Samuel v Herrick Mem'l Hosp, 201 F3d 830 (CA 6, 2000), Muzquiz v WA Foote Mem'l Hosp, Inc, 70 F3d 422 (CA 6, 1995), and Savas v William Beaumont Hosp, 216 F Supp 2d 660 (ED Mich, 2002). Citations to the unpublished decisions that are in

In Long, the Court of Appeals expressly held that the judicial nonreview doctrine applies to a physician's contract claims arising out of a private hospital's medical staffing decisions. Id. at 586. Plaintiffs were a physician and his wife who appealed an order dismissing their claims under breach of contract and promissory estoppel theories specifically alleging that the hospital revoked the physician's privileges with malice. Id. at 579. The physician was the Director of Anesthesia and Operating Room Services when the hospital granted an exclusive contract for anesthesia services to an anesthesia practice with which he was not affiliated, and as a result, the hospital board voted to eliminate his position. Id. at 580. The physician claimed that the hospital bylaws afforded him a contractual right to hold a hearing and find him incompetent before terminating his privileges. Id. at 586. However, the Court of Appeals did not need to reach those claims because Chelsea Community Hospital was a private hospital; therefore, the contract claim was simply not reviewable. Id. (citing Sarin v Samaritan Health Ctr, 176 Mich App 790, 795; 440 NW2d 80 (1989), Regaulos v Comty Hosp, 140 Mich App 455, 461; 364 NW2d 723 (1985), Hoffman v Garden City Hosp-Osteopathic, 115 Mich App 773, 778; 321 NW2d 810 (1982), and Muzquiz v WA Foot Mem'l Hosp, Inc, 70 F.3d 422, 430 (CA 6, 1995)). The Court of Appeals stated that where a claim is contractual in nature, "[a] private hospital is empowered to appoint and remove its members at will without judicial intervention." Id. (citations omitted).

The Court of Appeals clearly erred in not following Long—in direct violation of MCR 7.215(J), which mandates that the case must be followed—by reasoning that it was "unclear" why the judges should follow Long in the instant case. The Court of Appeals begins its analysis in expressly stating that Dr. Feyz's breach of contract claim is "extremely vague [, and it was] skeptical that [the claim] could survive a motion for summary disposition if the motion were

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accord are omitted.

decided on broader grounds than that employed by the trial court." Feyz, supra at 708. On one hand, the Court of Appeals felt that the physician "clearly implicated" activity beyond the scope of the peer review body (in this instance, the Ad Hoc Committee), and in the same breath, stated that the physician "attempt[ed] to state" a cause of action beyond the scope of peer review immunity. Id. The Court of Appeals then concluded that while summary disposition of the breach of contract count may ultimately prove appropriate, it is not appropriate based on the immunity granted by the peer review statute. Id. at 709.

The Court of Appeals attempts to justify why it feels that Long is not precedentially binding, but its reasoning is inconsistent and illogical:

> Finally, as for Count VII (breach of contract based on a violation of hospital by-laws), it is unclear whether Long would control. Long did not directly address this issue, concluding that the breach of by-laws claim was not adequately pleaded. But the Long Court did state that a breach of contract or breach of by-laws claim is potentially viable if it does not violate the non-reviewability doctrine. As discussed above, in our view, breach of contract and breach of by-laws claims do not violate the doctrine unless they seek to impose greater liability on a private hospital than what another private employer would be subject to under the law. The question whether Michigan law recognizes a breach of contract claim based on the breach of corporate by-laws is not before us; therefore, we need not address that issue. Because the trial court broadly applied the non-reviewability doctrine to conclude that no breach of contract derived from a breach of by-laws could be maintained, the trial court erred in granting summary disposition on that basis. The trial court may consider summary disposition of this count on another basis, but we caution the trial court that it cannot be granted on the basis that private hospitals enjoy a special immunity from such claims. Rather private hospitals are subject to the same breach of contract claims as any other private corporation. Therefore, if the issue is again raised, the trial court must determine whether a breach of contract claim may be used on a corporation's violation of its own by-laws under Michigan law. If the answer to that question is "yes," and if plaintiff has adequately pleaded such a claim, the claim is viable despite the non-reviewability doctrine. But plaintiff's claim does not lack viability merely because the defendant is a private hospital rather than some other private corporation.

Id. at 724-725.

Long is directly on point. Quite plainly and simply, both Long and the instant matter involved general contract claims based on the peer review process. Plaintiff-Appellee filed the following with regard to his contract claims under Count VII:

> 155. The Medical Staff By-Laws are a contract under which members of the Medical Staff exercise staff privileges at Mercy.
>
> 156. Defendants Mercy and the Medical Staff have repeatedly breach [sic] and continue to breach that contract by ignoring procedural requirements and otherwise violating the By-Laws.

(Plaintiff-Appellee's Complaint and Jury Demand, at 30-31 [hereinafter "Complaint"], attached as **Exhibit A**.) The Long Court held that a private hospital has a right to appoint and remove physicians without a court's intervention and then expressly stated that this rule of law is "limited to disputes that are contractual in nature." Long, supra at 586. Simply because the plaintiff in Long failed to present sufficient evidence on his claims does not negate the rule handed down by the Long Court, as the Court of Appeals would like to believe. The Court of Appeals' statement that Long "did not directly address this issue" is not only disingenuous, it is illogical. The Court of Appeals was duty-bound to follow the holding in Long based on MCR 7.215(J) and the principles of stare decisis, and its failure to do so is in clear error and should be reversed by this Court.

The majority in Feyz redefined judicial nonreviewability (essentially now "reviewability") by adopting the following two-step analysis: (1) whether the plaintiff's breach of contract claim was based on a hospital's violation of its own bylaws under Michigan law, and (2) whether the plaintiff adequately pleaded his complaint. Feyz, supra at 724. If the answer to both is yes, then the plaintiff has a viable claim. Id. at 725. Because of the Court of Appeals' holding, judicial nonreviewability now only applies to breach of contract or bylaws claims if "they seek to impose greater liability on a private hospital than what another private employer

would be subject to under the law." Id. at 724. This new judicial "reviewability" doctrine was created by the Court of Appeals in complete contravention of case-law precedent—it ignores the express language of the statute and renders unworkable the comprehensive statutory scheme mandating the confidentiality of peer review proceedings and patient care confidentiality.

To justify its ruling in severely limiting the doctrine of judicial nonreview of peer review issues, the Feyz Court only turned to one specific facet of numerous non-Michigan cases regarding the constitutional due-process safeguards of a private hospital's actions as opposed the actions of a publicly-owned hospital. It stated that "if we look at the underpinnings of these decisions, we see that the principle [of judicial nonreview] is not quite so sweeping at all." Id. at 711-712. After laboring upon this narrow focus, the Feyz Court concluded that judicial nonreviewability only applies to breach of contract or bylaws claims that seek to impose a greater liability on a private hospital than another private corporation would be subject to under the law. Id. at 724. However, the Court of Appeals cuts its analysis short and fails to come to the logical conclusion underlying each of these cases: the same courts would also refuse to intervene in the private-staffing decisions of any business—not just a hospital.

The Feyz Court also failed to address the public policy underlying the doctrine of judicial nonreview—had it done so, it could not have come to the conclusion that it did. Judge Murray astutely pointed out this analytical flaw in his partial dissent:

> The majority's analysis of the underpinnings for the nonreviewability doctrine is not complete. It is certainly true that one of the issues decided by the foundational case of Shulman v Washington Hosp Ctr, 222 F Supp 59 (DDC, 1963)[,] was that a private hospital's decision was not subject to the same constitutional prohibitions as the decision of a public hospital. However, the Shulman Court provided an additional rationale to supports its holding that courts should refrain from reviewing staffing decisions of private hospitals, the rationale primarily being that courts are ill equipped to decide such issues.

Feyz, supra at 729-730 (Murray, PJ, dissenting).

The Court of Appeals' analysis of these cases is inherently flawed. First, the underpinnings of the doctrine of judicial nonreview of peer review issues are not solely based on the difference of constitutional, procedural safeguards afforded to physicians with privileges at public hospitals compared to those with privileges at private hospitals; rather, the rule was also adopted based on the rule of judicial nonreviewability of private corporate decisions where a court will not intervene in the decisions of a private corporation unless they are illegal, fraudulent, or ultra vires. Levin v Sinai Hosp of Baltimore City, 186 Md 174, 179-180; 46 A2d 298 (1946) (quoted by Feyz, supra at 714 without the inclusion of "illegal"). Second, and more important, are the public policy reasons underlying the doctrine of judicial nonreview of peer review issues. In the seminal case of Shulman v Washington Hospital Center, 222 F. Supp. 59 (DDC, 1963), adopted by the Michigan Court of Appeals in Hoffman, the United States District Court for the District of Columbia stated the following policy reasons justifying judicial noninterference in private hospitals' staffing decisions:

> There are sound reasons that lead the courts not to interfere in these matters. Judicial tribunals are not equipped to review the action of hospital authorities in selecting or refusing to appoint members of medical staffs, declining to renew appointments previously made, or excluding physicians or surgeons from hospital facilities. The authorities of a hospital necessarily and naturally endeavor to their utmost to serve in the best possible manner the sick and the afflicted that knock at their door. Not all professional men, be they physicians, lawyers, or members of other professions, are of identical ability, competence, or experience, or of equal reliability, character, and standards of ethics. The mere fact that a person is admitted or licensed to practice his profession does not justify any inference beyond the conclusion that he has met the minimum requirements and possesses the minimum qualifications for that purpose. Necessarily hospitals endeavor to secure the most competent and experienced staff for their patients. Without regard to the absence of any legal liability, the hospital in admitting a physician or surgeon to its facilities extends a moral imprimatur to him in the eyes of the public. Moreover, not all professionals have a personality that enables them to work in harmony with others, and to inspire confidence in their fellows and in patients. These factors are of importance and here, too, there is room for

> selection. In matters such as these, the courts are not in a position to substitute their judgment for that of professional groups.

Id. at 64. As such, the basis underlying the Shulman rule was not only the constitutional significance between public and private hospitals, but it was also the court's policy choice to refrain from intervening in an area where it had no expertise, and where physicians do have the experience, duties, and incentives to ensure that a qualified medical staff provides quality care.

Similarly, the policy underlying the passage of the Federal Health Care Quality Improvement Act ("HCQIA"), 42 USC 11101 et seq., is also in accord with the underlying policy relied on by Michigan Courts prior to Feyz in adopting the rule that contract and related tort claims arising out of a private hospital's peer review process are not reviewable by the courts. Although the HCQIA does not directly address the judicial reviewability of peer review activities, it does address immunity for peer review activities, a necessary component of sincere and robust debate in the peer review process. Here, Congress stated, among other policy reasons, that "the need to improve the quality of medical care [has] become a nationwide problem that warrant[s] greater efforts than those that can be undertaken by any individual State. . . . This nationwide problem can be remedied through effective professional peer review." 42 USC 11101. Effective professional peer review necessarily is conducted by physicians.

The rule of judicial nonreview of the staffing decisions of private hospitals is also consistent with and necessary for the comprehensive confidentiality of peer review activities, statutorily imposed to assure the quality of the review process. MCL 331.533, MCL 333.20175(8), and MCL 333.21515. The Public Health Code, under Sections 20175(8) and 21515, imposes a complete bar on the disclosure of data and information collected for or by individuals or committees that are assigned a peer review function. Section 20175 applies to health facilities or agencies and schools of osteopathic and human medicine, and Section 21515

applies to all peer review records, data, and knowledge. Specifically, both state that the records, data, and knowledge collected during peer review "[1] are confidential, [2] shall be used only for the purposes provided in this article [, Article 17 of the Public Health Code, MCL 333.20101-.22260], [3] are not public records, and [4] are not subject to court subpoena." MCL 333.20175(8) and 333.21515.

MCL 331.531 through 331.533 govern peer review entities and provide for civil and criminal immunity for those participating in the peer review process unless such participation is conducted with malice. These Sections also impose an absolute bar on the disclosure of data and information collected, and the proceedings of a peer review body in any administrative or civil proceeding. MCL 331.533 provides in part the following:

> Except as otherwise provided in section 2, [MCL 331.532 that provides for the release of information for peer review or research purposes,] the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding.

In each statute, the prohibition on disclosure clearly and unequivocally applies to all civil and administrative proceedings. No exception exists, and the Michigan courts have consistently upheld the confidentiality of peer review prohibiting disclosure. See Attorney General v Bruce, 422 Mich 157; 369 NW2d 826 (1985) (licensing investigation) and Dye v St John Hosp and Med Ctr, 230 Mich App 661; 584 NW2d 747 (1998) (medical malpractice action).

In Dorris v Detroit Osteopathic Hospital Corporation, 460 Mich 26; 594 NW2d 455 (1999), this Court examined the confidentiality of a hospital incident report. In doing so, this Court acknowledged that the same polices that underlie peer review confidentiality also underlie the doctrine of judicial nonreview:

> Hospital personnel are expected to give their honest assessment and reviews of the performance of other hospital staff in incidents such as the one in the present case. Absent the assurance of confidentiality as provided by §§ 21515 and 20175(8), the willingness of hospital staff to provide their candid assessment will be greatly diminished. This will have a direct effect on the hospital's ability to monitor, investigate, and respond to trends and incidents that affect patient care, morbidity, and mortality.

Id. at 42.

The Feyz Court held that summary disposition was improper on Plaintiff's civil rights claims, stating that MCL 331.531 does not provide immunity for actions that violate a physician's civil rights. Feyz, supra at 704. However, to the extent that Plaintiff-Appellee's civil rights claims were based on allegations that Mercy "regarded him as impaired" in its referral to the Health Professional Recovery Program ("HPRP"), Defendants-Appellants are still entitled to immunity. See infra Section III. Outside the scope of the referral to the HPRP, legal conclusions of the Feyz Court were correct regarding the judicial reviewability and lack of immunity for civil rights claims, but as shown infra in Section II, its reasoning is in clear error and should be reversed by this Court.

The Feyz Court did not address how its obliteration of the judicial nonreview doctrine and its limitation of peer review immunity would affect the sanctity and legal obligation of confidentiality a hospital owes to its patients. Disclosure of patient information to third parties is prohibited by State statutory and common law. MCL 600.2157, Dorris, supra at 32-39, and Saur v Probes, 190 Mich App 636, 640-641; 476 NW2d 496 (1991). Patient confidentiality is also protected by the Health Insurance Portability and Accountability Act of 1996 and its regulations; generally, a health care provider may not use or disclose a patient's protected health information without the patient's valid authorization. 42 USC 1301, 45 CFR 164.508.

Clearly, the same rationale underlies both peer review confidentiality and patient confidentiality. This rationale also compels adherence to the judicial nonreview doctrine in contract and related tort claims—as Michigan courts have consistently held prior to Feyz. Amicus Curiae respectfully asks this Court to consider these privacy implications in rendering its holding in this Appeal and reverse the decision of the Court of Appeals.

II. MCL 331.531 provides immunity for actions taken in furtherance of peer review, except those done with malice, and the Michigan Court of Appeals erred in creating a per se rule that all civil rights claims entail "malice" such that peer review immunity is automatically eliminated.

Peer review plays an essential role in ensuring that competent physicians practice at each hospital and is an integral tool to improving the quality of health care. See 42 USC 11101. As such, the Michigan Legislature has mandated that peer review be conducted by hospitals and provides for safeguards of confidentiality and immunity to effectively discharge that mandate. MCL 331.531-331.533; MCL 333.20175(8); MCL 333.21513(a)-(d); and MCL 333.21515. Michigan's peer review statute states that "[a] person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider." MCL 331.531(1). The statute grants civil and criminal immunity to a person, organization, or entity for providing information within the scope of the review entity unless it is done with malice. MCL 331.531(3)-(4).

Civil and criminal immunity is granted for providing "to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider." MCL 331.531(1), (3)(a). Such immunity is also

provided for an "act or communication within its scope as a review entity" as described above and for publishing a record of peer review proceeding pursuant to the statute. MCL 331.531(3)(b)-(c). A "review entity" is defined by statute as one of the following: the State of Michigan, a state or county association of health care professionals, or a health facility or agency licensed under Article 17 of the Public Health Code (which includes hospitals such as Mercy). MCL 331.531(2).

The Feyz Court determined that allegations of civil rights claims in the peer review process were reviewable by a court and not subject to immunity, and it reached that conclusion through two alternate means. First, MCL 331.531 only provides immunity to those activities within the "scope" of a peer review body's function, and ascending to the Court of Appeals; violating someone's civil rights is beyond the scope of that function. Feyz, supra at 704. As Judge Murray astutely pointed out in his dissent, a court cannot look at "the legal result of the act or communication" in determining what the scope of a peer review's function is, but rather, a court must analyze the range of operation of a peer review committee and "focus on the subject matter on which the initial act or communication complained of was made . . . ." Id. at 726 (Murray, PJ, concurring in part, dissenting in part). To focus on the end legal result in determining whether the activity was within the scope of a peer review body's functions is merely circular reasoning and completely ignore the intent of the statute—"every time there is a potential for legal liability, there would be no immunity . . . ." Id. The Feyz majority is advocating that the ends justify the means—a concept foreign to our system of justice.

Here, Dr. Feyz was disciplined and placed on probation by the Medical Staff Executive Committee for his failure to cooperate with the medical staff, hospital staff, and administration and also for his refusal to follow hospital policy and procedures. These facts are not disputed. In

accordance with the Medical Staff Bylaws, the Medical Staff Executive Committee notified Dr. Feyz of his probation and of the behaviors that would result in immediate suspension and revocation of his privileges at Mercy. All these actions by the Medical Staff Executive Committee and the Ad Hoc Committee in reviewing Dr. Feyz's behavior were well within the scope, or subject matter, of the peer review process.

Second, the Court of Appeals, in one, broad sweeping stroke, held that any act that violates a Federal or State civil rights law is per se malice, and therefore, not protected by the Michigan peer review statute. However, nowhere in prior legal jurisprudence has malice ever been considered an automatic element of a legal theory entailing an action that is less than intentional. A person's civil rights can be violated negligently through negligence or through disparate impact. To presume that negligence and malice are one and the same in all civil rights actions is logically inconsistent. If the Court of Appeals' ruling is allowed to stand, a plaintiff need only show the elements of a civil rights claim in order to prove malice. Malice would be presumed to be present in any civil rights claim whether a physician is immune from his activities for participating in peer review activities will simply become nothing more than a matter of artful pleading by plaintiff's attorneys in alleging a civil rights claim.

The Michigan Legislature did not define what constitutes malice within the scope of the peer review immunity statute. Under these circumstances, it is appropriate to turn elsewhere for guidance. Rose Hill Ctr v Holly Township, 224 Mich App 28, 33; 568 NW2d 332 (1997) (citing Yaldo v North Pointe Ins Co, 217 Mich App 617, 621; 552 NW2d 657 (1996)). Prior to Feyz, the Court of Appeals adopted the definition of actual malice applicable in defamation suits as appropriate in interpreting malice for the purposes of peer review immunity. Veldhuis v Allan, 164 Mich App 131, 136-137; 416 NW2d 347 (1987), and Regaulos, supra at 463; see also Lin v

Evening News Assoc, 129 Mich App 419, 433-434; 342 NW2d 573 (1983). Applying this definition, peer review immunity would not apply if the individual or review entity supplying the information or data does so with knowledge of its falsity or with reckless disregard of its truth or falsity.[2] Veldhuis, supra at 136-137 (citation omitted). Further, malice cannot be pleaded in a speculative or conclusory fashion—it must be clear and convincing that a genuine issue of material fact exists regarding the issue. Id. at 137, Regaulos, supra at 463, and Lin, supra at 433-434.

However, the Court of Appeals in reaching its conclusion in Feyz rebuked traditional legal analysis again by simply ignoring the definition of "malice" previously adopted by it in Regaulos and Veldhuis for the purposes of interpreting MCL 331.531. Rather, without explanation, the Court of Appeals chose to adopt a broader definition of malice from Black's Law Dictionary: "Malice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen." Feyz, supra at 704-705 (citing Black's Law Dictionary (5th ed)).

The trial court, although granting summary disposition in favor of the Defendants-Appellants on the basis of MCR 2.116(C)(8), upon review on the facts in record, it concluded that "no clear and convincing proof of malice can be found." Feyz, supra at 705. The Court of Appeals, however, by its definition of malice, did not require proof of malice—such is presumed with any violation of a civil rights law.

This Court has determined that the doctrine of stare decisis applies to decisions that construe a statute, especially when the Legislature acquiesces in that construction by failing to change the statute's language or define the terms used in the statute. Boyd v WG Wade Shows,

[2] Note that this definition is only slightly broader than the HCQIA, which grants immunity for providing a peer review body information "unless such information is false and the person providing it knew that such information

443 Mich 515, 525; 505 NW2d 544 (1993). When the Legislature acquiesces in a statute's interpretation "the judicial power to change that interpretation ought to be exercised with great restraint." Id. Here, the Regaulos Court adopted the defamation definition of malice to interpret peer review immunity in 1985, and the Legislature has not acted to define the term differently in over twenty years. The principles of both stare decisis and legislative acquiescence mandate that this is the definition appropriate in interpreting the peer review immunity statute.

It is clear from the Complaint that Plaintiff-Appellee has repeatedly violated Mercy's policies and persisted in actions that were disruptive and detrimental to the delivery of patient care. He has simply pleaded no factual allegations sufficient to establish that the corrective actions taken against him for his repeated failure to cooperate with the medical staff, hospital staff, and administration were carried out with malice. Mercy and its medical staff have a statutory obligation to provide quality patient care and all actions taken against Plaintiff-Appellee were in furtherance of that obligation. Accordingly, this Court should affirm the trial court's determination that Plaintiff-Appellee failed to show malice sufficient to defeat the immunity of each of Defendants-Appellants for their peer review actions. Alternatively, this Court should, at a minimum, hold that whether malice exists is a factual question to be determined by the trier of facts if a party's factual allegations are supported by sufficient proof after discovery.

III. Plaintiff-Appellee's tort and civil rights claims against the Medical Staff Executive Committee and other named Defendants-Appellants premised on the Health Professional Recovery Program are not reviewable due to Defendants-Appellants' immunity from liability under MCL 333.16244(1).

Michigan law imposes a statutory obligation on a licensed physician who has reasonable cause to believe that another physician is impaired—which would include substance abuse or

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was false." 42 USC 1111(a)(2).

mental illness—to report that fact to the Department of Community Health via the HPRP. MCL 333.16168; MCL 333.16221(b); MCL 333.16222(1); MCL 333.16223(1). Physicians complying with these reporting requirements in good faith are immune from civil or criminal liability. MCL 333.16244. The law also provides a presumption of good faith in reporting such belief. Specifically, MCL 333.16244(1) provides the following:

> A person, including a state or county health professional organization, a committee of the organization, or an employee or officer of the organization furnishing information to, or on behalf of, the organization, acting in good faith who makes a report; assists in originating, investigating, or preparing a report; or assists a board or task force, a disciplinary subcommittee, a hearings examiner, the committee, or the department, in carrying out its duties under this article is immune from civil or criminal liability including, but not limited to, liability in a civil action for damages that might otherwise be incurred thereby and is protected under the whistleblowers' protection act, Act No. 469 of the Public Acts of 1980, being sections 15.361 to 15.369 of the Michigan Compiled Laws. A person making or assisting in making a report, or assisting a board or task force, a hearings examiner, the committee, or the department, is presumed to have acted in good faith. . .

The Feyz majority stated that Plaintiff-Appellee's Complaint raised no allegations that the referral to the HPRP was made maliciously.[3] Feyz, supra at 707. Thus, if there are no allegations of malice, then logically there could not be sufficient evidence to rebut the presumption that the referral by Defendants-Appellants to the HPRP was made in good faith, and the trial court's conclusion was proper that Defendants-Appellants are entitled to summary disposition because they are immune from liability under MCL 333.16244. HPRP reporting is immune from liability under a "good faith" standard. It is wholly irrelevant that the referral after appropriate testing was later proved to be unnecessary if made in good faith.

Here, Mercy had reasonable cause to believe that Plaintiff-Appellee was practicing under a mental impairment. His thought-processes appeared to be affecting his behavior and his ability

[3] However, Judge Murray in his partial dissent, stated that he felt that Plaintiff-Appellee met the established definition of malice adopted by the Regaulos Court, by pleading that the Defendants-Appellants had reported him to

to treat hospital patients, causing him to consistently violate hospital policies and engage in a battle of wills with Mercy's administration for years. Under the circumstances, it would have been rational for Plaintiff-Appellee to take appropriate procedural steps to change hospital policies rather violating them and requiring the nurses to violate them. Because of Plaintiff-Appellee's irrational and obstinate behavior in the face of Mercy's repeated attempts to address his concerns through proper channels, there was reasonable cause to believe that Plaintiff-Appellee was impaired. Therefore, Mercy's obligation to report Plaintiff-Appellee to the HPRP was mandatory under Michigan law, and Plaintiff-Appellee's claims against Mercy for reporting him to the HPRP and those for "regarding him as disabled" are not actionable. As such, the trial court's dismissal of Plaintiff-Appellee's discrimination claims should be affirmed for the alternative reason that Defendants-Appellants are immune from liability under MCL 333.16244(1).

IV. The Michigan Court of Appeals erred in refusing to apply peer review immunity to the common-law claims against the Medical Staff Executive Committee based on the statement that Defendants-Appellants had not "argued" that the Medical Staff Executive Committee constituted a peer review committee.

For the purposes of the peer review statute, a "review entity" consists of, among other things, "[a] duly appointed peer review committee of . . . a health facility . . . ." MCL 331.531(2). In the instant matter, however, Plaintiff-Appellee argued and the Court of Appeals erroneously agreed that the Mercy Medical Staff Executive Committee was not a "duly-appointed" peer review body; therefore, it was not entitled to immunity for reporting Plaintiff-Appellee to the HPRP. Feyz, supra at 707-708. The Court of Appeals went further to state that Mercy never argued that the Medical Staff Executive Committee was a peer review committee, but only that the Ad Hoc Committee (appointed by the Medical Staff Executive Committee to

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the HPRP with full knowledge that he was not impaired. Feyz, supra at 728 (Murray, PJ, dissenting in part).

investigate the factual circumstances of Plaintiff-Appellee's actions) was a duly appointed peer review committee. Id. at 707. This analysis defies logic and is merely an attempt to reach a desired legal result. First, Mercy has consistently argued that its Medical Staff Executive Committee is a peer review committee at all levels of this Appeal. (Defendants-Appellants' Brief on Application for Leave to Appeal, at 35, attached as **Exhibit B**.) Second, even if Mercy failed to argue that the Medical Staff Executive Committee is a duly appointed peer review body, the Medical Staff Bylaws excerpt offered by Plaintiff-Appellee himself in conjunction with his initial Complaint conclusively demonstrate that the Medical Staff Executive Committee was a peer review committee. (The excerpt from the Mercy Medical Staff Bylaws is attached as **Exhibit C**.) As Judge Murray pointed out in his dissent on this issue:

> There can be no dispute that the Executive Committee, which oversees the medical staff and makes all decisions regarding the discipline of medical staff members, is a review entity as defined by the statute. MCL 331.531(2)(a) and (b). Additionally, the bylaws grant the [Medical Staff] Executive Committee the authority to create a "special committee," such as the ad hoc committee, to investigate matters submitted to the [Medical Staff] Executive Committee.

Feyz, supra at 727-728 (Murray, PJ, dissenting). It simply defies logic that the majority could conclude that a duly appointed peer review body somehow ceases to be a peer review body upon appointing a committee to investigate the factual circumstances of a particular disciplinary matter. Both the Medical Staff Executive Committee and the Ad Hoc Committee are duly appointed peer review bodies—plain and simple. As such, the actions of both the Medical Staff Executive Committee and the Ad Hoc Committee are immune from liability unless done with malice. In addition, other reported cases on peer review immunity have recognized that a Medical Staff Executive Committee is a peer review committee subject to immunity. See e.g., Veldhuis, supra, and Regualos, supra.

CONCLUSION

Wherefore, Amicus Curiae, in support of Defendants-Appellants Mercy Memorial Hospital, Medical Staff of Mercy Memorial Hospital, Richard Hiltz, James Miller, D.O., John Kalenkiewicz, M.D., J. Marshall Newbern, D.O., and Anthony Songco, M.D., respectfully request this Court to reverse the judgment of the Court of Appeals and reinstate the trial court's order of summary disposition in favor of Defendants-Appellants.

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Dated: February 9, 2006